

No. 48821-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Adam Diaz,**

Appellant.

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Pierce County Superior Court Cause No. 15-1-01288-8

The Honorable Judge K.A. van Doorninck

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**

P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Diaz's double jeopardy rights under the Fifth and Fourteenth Amendments and Wash. Const. art. I, §9.
2. The trial court erred by declaring a mistrial and discharging the first jury over Mr. Diaz's objection.
3. The trial court erred by declaring a mistrial and discharging the jury in the absence of a manifest necessity.
4. The trial court erred by declaring a mistrial and discharging the jury in the absence of extraordinary and striking circumstances requiring discontinuation of the trial in order to obtain substantial justice.
5. The trial court acted precipitately by declaring a mistrial and discharging the jury without providing Mr. Diaz a full opportunity to explain his objection.
6. The trial court erred by declaring a mistrial and discharging the jury without according careful consideration to Mr. Diaz's interest in having the trial concluded in a single proceeding.
7. The trial court erred by declaring a mistrial and discharging the jury over objection without considering available alternatives.
8. The trial judge's decision to declare a mistrial and discharge the jury violated Mr. Diaz's valued constitutional right to a verdict from the jurors who began deliberations on his case.

**ISSUE 1:** An accused person has the "valued right" to receive a verdict from the jury he selected for trial. Did retrial following the trial court's precipitate declaration of a mistrial over objection violate Mr. Diaz's double jeopardy rights under the Fifth and Fourteenth Amendments and Wash. Const. art. I, §9?

9. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 2:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Diaz is indigent, as noted in the Order of Indigency?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Adam Diaz with possession of stolen property, three counts of criminal trespass, driving while license suspended and failure to use an ignition interlock device. Information filed 4/1/15, Amended Information filed 6/23/15, Supp. CP. They alleged that he stole items from residents at his grandmother's assisted living home. RP (2/2/16) 33-34, 63, 81, 104. Mr. Diaz denied the trespasses and explained he was visiting his grandmother. RP (2/2/16) 38; RP (2/3/16) 140. He was arrested in the parking lot, and did not contest the driving charges. RP (2/2/16) 34-37.

The case went to trial and after some time, the deliberating jury sent a note out. RP (7/29/15) 62-188; RP (8/3/15) 199-254; RP (8/4/15) 2-20. The note stated that they had reached a verdict on five of the counts, but were deadlocked as to the sixth. RP (8/4/15) 18. The court called the jury into the court room and asked the jurors if each believed that the jury could reach a verdict in a reasonable amount of time. RP (8/4/15) 20. All jurors responded in the negative. RP (8/4/15) 19-21.

Mr. Diaz asked the judge to admonish the jurors to continue to deliberate in an effort to reach a verdict. RP (8/4/15) 21-22. The court instead declared a mistrial as to the possession of stolen property charge.

RP (8/4/15) 23. The jury acquitted Mr. Diaz on one count of criminal trespass, and convicted him on two others. They also convicted him of the driving offenses. RP (8/4/15) 25-26.

The state amended the possession of stolen property charge to second degree instead of first degree. RP (2/1/16) 6-7; CP 8. The court retried Mr. Diaz on the possession of stolen property charge, and this time the jury convicted him. RP (2/4/16) 230-231, CP 31.

After being sentenced, Mr. Diaz timely appealed. CP 47. The trial court found Mr. Diaz indigent and appointed an attorney to represent him on appeal. CP 48-49.

### **ARGUMENT**

#### **I. MR. DIAZ’S SECOND TRIAL VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY.**

When the first jury indicated it hadn’t reached a verdict as to one charge, Mr. Diaz asked the court to allow them to continue deliberating. RP (8/4/15) 21-22. The state had no objection. RP (8/4/15) 22-23. The court declared a mistrial and discharged the jury without further discussion. RP (8/4/15) 23.

The court declared a mistrial precipitately, without the consent of either party, and without giving Mr. Diaz a full opportunity to explain his position. RP (8/4/15) 21-23. The court did not give careful consideration

to Mr. Diaz's interest in having the trial concluded in a single proceeding. RP (8/4/15) 21-23. Nor did the court consider alternatives to a mistrial. RP (8/4/15) 21-23. Under these circumstances, the second trial violated Mr. Diaz's right to be free from double jeopardy. *State v. Robinson*, 146 Wn. App. 471, 479-480, 191 P.3d 906 (2008).

- A. Mr. Diaz's double jeopardy claims may be raised for the first time on appeal, and are reviewed *de novo*.

Courts review double jeopardy claims *de novo*. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). Double jeopardy violations create manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Strine*, 176 Wn.2d 742, 751, 293 P.3d 1177 (2013).

- B. By declaring a mistrial and discharging the first jury over Mr. Diaz's objection, the trial judge infringed his valued right to a verdict from the jury he selected to try his case.

The double jeopardy right<sup>1</sup> protects "the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)

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<sup>1</sup> U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9.



(quoting *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). In this case, the court infringed Mr. Diaz’s right to have his trial completed by the first jury.

Absent the accused person’s consent, a judge’s discretion to declare a mistrial does not come into play unless extraordinary and striking circumstances exist. *Robinson*, 146 Wn. App. at 479 (citing *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982)). A mistrial ordered without the defendant’s consent is “tantamount to an acquittal,” unless justified by manifest necessity. *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003). While helpful, the jury’s own assessment that it is deadlocked is not controlling.” *State v. Labanowski*, 58 Wn. App. 860, 866–67, 795 P.2d 176 (1990), *review granted*, 115 Wn.2d 1027, *aff’d*, 117 Wn.2d 405, 816 P.2d 26 (1991).

Mr. Diaz asked the court to allow jurors to continue deliberating. RP (8/4/15) 21-22. Accordingly, the discharge functions as an acquittal unless prompted by manifest necessity and the existence of extraordinary and striking circumstances. *Juarez*, 115 Wn. App. at 889; *Robinson*, 146 Wn. App. at 479. The court’s decision here to declare a mistrial and discharge the jury was not prompted by manifest necessity or the existence of extraordinary and striking circumstances.

Appellate courts consider three factors in assessing a mistrial

ordered over the defendant's objection. *Robinson*, 146 Wn. App. at 479-480. In this case, all three factors establish a violation of Mr. Diaz's double jeopardy rights. *Id.* Accordingly, the trial court's decision declaring a mistrial and discharging the jury is not entitled to deference.

First, the trial court must not act precipitately. Instead, the judge must give both sides a full opportunity to explain their positions. *Id.* Here, the court acted precipitately, and did not provide Mr. Diaz a full opportunity to explain his position. RP (8/4/15) 21-23.

Instead, the court entered the order declaring a mistrial and discharging the jury immediately after learning of the jury's difficulty and the parties' positions. RP (8/4/15) 21-23. The court's failure to provide Mr. Diaz a full opportunity to explain his position establishes that the decision was precipitate. *Robinson*, 146 Wn. App. at 479-480.

Other facts also suggest that the court's decision was precipitate under the circumstances. The decision to discharge the jury followed the very first time jurors indicated they were deadlocked. RP (8/4/15) 21-23. It came on the fifth day of trial, less than half-an-hour after the jury sent out its note. Minutes filed 8/4/15, p. 7, Supp. CP. The court should have engaged in a more deliberate process, rather than rushing to declare a mistrial.

The trial court made a precipitate decision. The first factor

outlined by the *Robinson* court suggests the court violated Mr. Diaz's double jeopardy rights by declaring a mistrial over his objection. *Robinson*, 146 Wn. App. at 479-480.

Second, the court must “accord[ ] careful consideration to the defendant's interest in having the trial concluded in a single proceeding.” *Id.* (quoting *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (footnotes and internal quotation marks omitted by *Robinson*). This factor is particularly important: a trial judge “must always temper the decision” to declare a mistrial “by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.” *United States v. Jorn*, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

Here, the court did not even mention Mr. Diaz's “interest in having the trial concluded in a single proceeding,” much less give it “careful consideration.” *Robinson*, 146 Wn. App. at 479-80 (internal quotation marks and citation omitted). The court's failure to acknowledge this important interest means its decision should not be given the usual deference afforded to a trial judge's decision to declare a mistrial. *See Strine*, 176 Wn.2d at 753.

Third, the trial court must consider alternatives to mistrial.

*Robinson*, 146 Wn. App. at 479-80. Here, the court did not consider available alternatives. The court could have asked jurors to return the following day to continue deliberations. Alternatively, the court could have asked them to continue deliberating into the evening.<sup>2</sup> Finally, the court could have considered providing “a carefully neutral” supplemental instruction. *See State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983).

For all these reasons, the court’s decision declaring a mistrial and discharging the jury violated Mr. Diaz’s valued right to have a decision from the jury he selected to try his case. *Jorn*, 400 U.S. at 484. His conviction must be reversed and the case dismissed with prejudice. *Id.*; *Robinson*, 146 Wn. App. at 484.

**II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

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<sup>2</sup> The jury sent out its note at 3:41 on the fifth day of trial. Minutes filed 8/4/15, p. 7, Supp. CP.

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.” *Sinclair*, 192 Wn. App. at 388.

Mr. Diaz has been convicted of numerous felonies. CP 37. He was sentenced to 22 months in prison on this matter, consecutive to other felony sentences. CP 40. The trial court determined that he is indigent for purposes of this appeal, and that he is unlikely to be able to pay in the future. CP 48. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

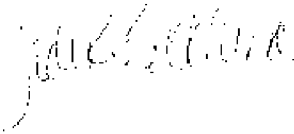
### **CONCLUSION**

For the foregoing reasons, Mr. Diaz's conviction for possession of stolen property must be dismissed with prejudice.

In the alternative, if the state substantially prevails, the Court of Appeals should exercise its discretion and decline to impose appellate costs.

Respectfully submitted on October 5, 2016,

### **BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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PO Box 2049  
Airway Heights, WA 99001-1899

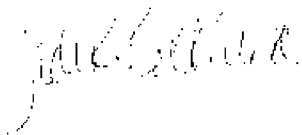
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 5, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

**October 05, 2016 - 9:39 AM**

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